

BEFORE THE
FEDERAL COMMUNICATIONS
COMMISSION WASHINGTON, D.C.20554

In the Matter of)	
Rates for Interstate Inmate Calling Services)	WC Docket No 12-375

NCIC COMMENTS IN RESPONSE TO SECURUS TECHNOLOGIES, INC. OCTOBER 8, 2015 PAPER

Network Communications International Corporation, doing business as NCIC Inmate Phone Services (“NCIC”), hereby submits comments in response to the Securus Technologies, Inc. (“Securus”) paper¹, dated October 8, 2015 (“Securus Filing” or “Filing”). In its Filing, Securus responded to the September 30, 2015 release by the Commission of a Fact Sheet for this Docket outlining the key reforms of Inmate Calling Service (“ICS”) to be voted on at the Commission’s October 22, 2015 Open Meeting.

Rates in Joint Proposal Not Supported in the Record

By letter to the Commission dated September 15, 2014, Securus, Global Tel*Link Corporation (“GTL”), and Telmate, LLC (“Telmate”) jointly submitted a proposal² (the “Joint Proposal”) recommending the adoption of \$0.24/min collect call rates and \$0.20/min rates for prepaid and debit calls. These rates exclude the 8% validation fee for each call also recommended in the Joint Proposal (page 5). With the proposed validation fee, the effective per minute rates recommended in the Joint proposal are \$0.26/min and \$0.22/min. The Joint

¹ Rates for Interstate Inmate Calling Services, CC Docket 12-375, Second Ex Parte Submission of Securus Technologies, Inc. (Public Version), October 8, 2015.

² Rates for Interstate Inmate Calling Services, CC Docket 12-375, Letter to Commissioners Wheeler, Clyburn, Rosenworcel, O’Rielly, and Pai from Securus Technologies, Inc., Global Tel*Link Corporation, and Telmate. LLC, dated September 15, 2014 (“Joint Proposal”).

Proposal makes no distinction between prison and jail rates. These rates are not supported by any analysis of provider cost data. To the contrary, evidence in the record shows the rates recommended by Securus, GTL, and Telmate are excessive particularly with respect to prisons.

In its Response to the Commission's Mandatory Data Collection, dated July 17, 2014, Securus revealed that its overall cost for providing service (combined jails and prisons) based on 2013 data is \$0.1776/min. In its Response dated August 22, 2014, GTL revealed that its overall cost for providing service in 2013 is \$0.1341/min and, in its Response dated August 18, 2014, Telmate revealed that its overall cost for providing service in 2013 is \$0.1583/min. The Commission's Mandatory Data Collection required that provider costs be separated by facility type (prison or jail), call type (collect, debit, or prepaid); further disaggregated by facility size based on average [inmate] daily population ("ADP"). Minutes of use also were also separated by facility type, facility size, call type, and further disaggregated by terminating jurisdiction (Local, Intrastate intraLATA, Intrastate interLATA, Interstate, and International).

Based on the level of disaggregation in the Mandatory Data Collection, it is reasonable to anticipate detailed provider analyses of costs by facility type and facility size for submission into the record. However, Securus, GTL, and Telmate made no effort in this proceeding to analyze such differences. Their rate recommendations in the Joint Proposal are wholly unsubstantiated and apply equally to both facility types regardless of facility size. One possible explanation is that the providers submitting the Joint Proposal serve approximately 85 percent of the prisons nationally. Therefore, they may wish to avoid discussions of any distinctions between the lower provider costs/min in prisons versus jails since such distinctions conflict with their own economic interests. It appears the providers in the Joint Petition expect the Commission to adopt calling rates for service in prisons that are more closely commensurate with the higher costs applicable to ICS in jails.

In his July 12, 2015 Ex Parte filing³ (Public View), Mr. Darrell A Baker submitted an analysis of provider costs disaggregated by facility type and size. The analysis revealed provider costs for prisons and separately for jails disaggregated by facility size. Mr. Baker used the 2013 data submitted in the Commission's Mandatory Data Collection for the following providers: Securus, GTL, Telmate, Pay Tel, NCIC, IC Solutions, and CenturyLink (pages 1-2). Mr.

³ WC Docket No. 12-375, Darrell A. Baker Ex Parte Presentation on Jail and Prison Costs, Rates, and Facility Cost Recovery, July 12, 2015.

Baker's analysis and findings were not challenged by any party to the proceeding. Exhibit D, page 2 shows that the average provider costs at prisons range from \$0.072/min to \$0.122/min, depending on facility size, with a composite provider cost of \$0.103/min. Excluding one provider's data which Mr. Baker explained "...deviates substantially from the cost per MOU of other providers" (page 2), he found that provider costs at jails range from \$0.177/min to \$0.213/min, depending on facility size, with a composite provider cost of \$0.187/min (Exhibit A, page 2).

In its October 8, 2015 Filing, Securus claims:

The record supports the adoption of a cost recovery method for correctional facilities as well as the rate caps proposed in the ICS Industry Proposal: \$0.20 per minute for prepaid calls; \$0.24 per minute for collect calls. (page 1)

However, other than the incessant references by some providers to the unsubstantiated rates in their Joint Proposal, the record supports no such thing. There is, however, unrefuted evidence in the record, based on each provider's data submissions to the Commission that substantiates much lower rates in prisons than in jails.

The Commission Fact Sheet recommends separate rates for prisons and jails with further disaggregation of the jail rates in accordance with facility size. In its Filing, Securus asserts "The draft rate caps are demonstrably below carriers' reported costs..." However, Securus nor any other party to the Joint Filing, nor their hired consultants, submitted any analyses whatsoever into the record showing their costs separated by facility type and facility size. Therefore, any claim that the Commission's draft rates are demonstrably below carriers' reported costs is wholly unsubstantiated and without merit.

Ancillary Fees in the Commission's Fact Sheet are Reasonable

On page 1 of its Filing, Securus concludes "...the record shows that the draft rates and rules for "ancillary fees" are unreasonable, arbitrary, and capricious, and that most of these fees are outside the Commission's jurisdiction." Ancillary fees can hardly be considered unreasonable, arbitrary, and capricious, when several ICS providers were already charging fees

at the level shown in the Commission's Fact Sheet, or lower. The record clearly demonstrates that the providers submitting the Joint Proposal charged their customers among the highest fees in the ICS industry. They could do so because end users have no choice with respect to their service provider. Absent competition for the rates and fees charged end users, no competitive forces exist to promote cost control and efficiency. Providers simply raised their fees as the opportunity presented itself leading to higher consumer charges and increased provider revenues. Nevertheless, the management for several smaller ICS providers exercised control over their costs such that they are unencumbered by the ancillary fees included in the Commission's Fact Sheet. One might question then whether Securus seeks to protect its excessive ancillary fees which are among the highest in the industry and which wholly satisfy the definition of unreasonable, capricious, and arbitrary.

Securus charges that most of the ancillary fees included or prohibited by the Commission's Fact Sheet are outside the Commission's jurisdiction. NCIC points out that there is a difference between ancillary services for which the Commission does not have explicit jurisdiction to regulate and ancillary charges for services over which the Commission has explicit authority to regulate. There is no dispute that the Commission has explicit authority under the Telecommunications Act to regulate ICS and, therefore, has explicit authority to regulate charges for functions supporting the provider's primary service to their end users (or separate classes thereof).

In nearly every case, ICS ancillary charges exist because the provider elected to break out charges separately, sometimes but not always, because the charges are applicable to optional services available to the end users. For instance, payments for prepaid service by money order or check is available free of charge to ICS end users but this payment method is frequently impractical because of the excessive latency involved in establishing service (up to ten days for some providers). For inmates recently booked, the long wait to establish contact with loved ones and/or attorneys is unacceptable, particularly in jails where more than two-third of inmates booked are released within 72 hours or less. Additionally, many inmate families are economically disadvantaged and can afford only small prepayments that exhaust quickly. They replenish their accounts as funds are available to them and are faced with the same extended latency issues should they choose the free payment submission avenues. Consequently, ICS providers "choose" to offer their end users "optional" payment methods including payment by

debit/credit card or payment transfer services wherein service is initiated within hours. It is analogous to a market wherein consumers have a choice of purchasing seeds to grow food, if prepared to wait that long, or food ready for preparation. For most, the economical method of establishing ICS service is essentially impractical so ICS end users are driven to the payment “options”. The additional cost of ICS ancillary services could be easily rolled into the provider’s total costs and recovered through calling rates alone. However, providers and regulators attempt to attribute costs to the cost causer whenever practical. Nevertheless, that does not mean that fees designed to recover those costs lay outside the Commission’s jurisdiction. Absent a competitive market, who else but the regulator will ensure that the fees are just and reasonable?

The Commission has a responsibility to ensure that ancillary fees are not assessed simply to enhance provider revenues. If an ancillary fee is assessed for purposes of recovering common costs previously accounted for in establishing rates, over recovery is an unfair and unreasonable practice in light of the non-competitive ICS marketplace. Additionally, it is common knowledge and supported by the record in this proceeding that some providers artificially inflated ancillary charges to their end users in order to subsidize excessive site commission offerings. Those fees are designed to be excessive. Moreover, the provider should not attempt to shield certain fees from regulation simply because they choose a third-party provider to assess the charges on their behalf nor should providers be authorized to shield from regulation ICS services and charges based on agreements with and use of unregulated providers that coexist within the confinement facility such as inmate canteen services, kiosk providers, inmate banking services, or other communication services. Furthermore, ICS providers should be prohibited from structuring their services to end users in a manner which, for a fee, forces fund transfers from unregulated third-party or affiliated providers co-located within the facility. NCIC encourages the Commission to monitor such potential abuses going forward. Whether the fees are charged directly by the provider or through agreement with an unregulated third-party, ICS prices are nevertheless impacted

The Commission’s First Order and Further Notice of Proposed Rulemaking (“FNPRM”) in this proceeding underscored the Commission’s jurisdiction over ancillary service charges.

...interstate ICS rates must be cost-based, and to be compensable costs must be reasonably and directly related to provision of ICS. Ancillary service charges are no exception; they also fall within this standard and the

Commission has the jurisdiction and authority to regulate them. Section 201(b) of the Act requires that “all charges, practices, classifications, and regulations for and in connection with” communications services be just and reasonable. Section 276 of the Act defines “payphone service” to encompass “the provision of inmate telephone service in correctional institutions, and any ancillary services,” and requires that providers be “fairly compensated.” The services associated with these ancillary charges are “in connection with” the inmate payphone services for purposes of section 201(b) and “ancillary” for purposes of section 276. As such, they fall within the standards we articulate above for determining which costs are compensable through interstate ICS rates.⁴

The Commission’s Recommendation for Facility Site Commissions is Reasonable

In its filing, Securus spent considerable verbiage lamenting the Commission recommendation not to pursue any prohibition of or limitations upon facility site commissions. The Commission’s recommendation refutes the assertion made by several ICS providers in this proceeding that the Commission, in its First ICS Order, prohibited interstate site commissions. The language of paragraph 56 in the Order, however, is clear that interstate site commissions were never prohibited.

We **do not conclude** (emphasis added) that ICS providers and correctional facilities cannot have arrangements that include site commissions. We conclude only that, under the Act, such commission payments are not costs that can be recovered through interstate ICS rates. Our statutory obligations relate to the rates charged to end users—the inmates and the parties whom they call. We say nothing in this Order about how correctional facilities spend their funds or from where they derive. We state only that site commission payments as a category are not a compensable component of interstate ICS rates.

In the Second FNPRM under this Docket, the Commission reaffirmed previous findings that site commission payments were not costs but “profit.” As a result, the Commission determined that

⁴ In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, rel. September 26, 2013 (“First ICS Order”), ¶ 90.

site commission payments “were not part of the cost of providing ICS and therefore not compensable in interstate ICS rates”⁵. In its Second FNPRM, the Commission made clear any prohibition of interstate and intrastate site commissions was still a matter under consideration by the Commission:

We seek comment on prohibiting all site commission payments for interstate and intrastate ICS to enable market-based dynamics to ensure just and reasonable ICS rates and fair ICS compensation.⁶

The Commission sought comments with respect to its authority to prohibit or limit site commission payments and, after consideration of the matter, chose not to pursue that course of action. Such a determination is certainly within the Commission’s prerogative given the legal uncertainties of interfering with provider decisions with respect to how they choose to use their profits after otherwise complying with the Commission’s caps on rates and fees.

One might question why providers that submitted the Joint Filing believe they in particular are harmed by the decision to not prohibit or otherwise limit site commissions. All ICS providers will be subject to the same Commission Order. Securus, GTL, and Telmate control 85 percent or more of the existing ICS contracts with confinement facilities. The record shows that some providers buoyed their profit margins by charging inflated ancillary fees and exorbitant single payment call prices in order to subsidize excessive site commission offerings. They did so to win facility contracts. With Commission caps on ancillary fees and single payment calls, providers who historically bolstered their profits by reliance on high charges and ancillary fees suddenly find themselves in a far more competitive posture with those providers who chose not to inflate their charges to end users and competed without resorting to such measures. Unlimited site commissions worked well for them before but only in conjunction with the ability to pass on higher charges to their end users.

The Commission is statutorily responsible for setting fair and reasonable provider rates but is not responsible for ensuring that providers maintain the profits to which they and their associated equity partners are accustomed. Going forward, some providers may be placed in the uncomfortable position of improving their cost management practices and ridding themselves of

⁵ In the Matter of Rates for Interstate Inmate Calling Services, Second Further Notice of Proposed Rulemaking, WC Docket No. 12-375, released October 22, 2014 (“Second FNPRM”), ¶10.

⁶ Second FNPRM, ¶10. See also ¶19.

unnecessary overhead. In the face of such uncertainties and with the prospects of competing on a more level playing field with providers who chose an altogether different business strategy, it is no surprise that some may decry the Commission decision to forebear the potential jurisdictional quagmire associated with prohibiting or limiting site commissions. Those providers who loudly and bitterly protest the decision are likely the same providers who believe their existing profitability and market dominance is most at risk. Experience in Alabama, wherein the Alabama Public Service Commission took a similar approach in its Order for intrastate ICS implemented on July 1, 2015, shows that capping rates, fees, and single payment call charges is already exerting extensive downward pressure on contractual site commission offerings. Consequently, NCIC completely supports the Commission's decision and believes that it is an entirely reasonable approach for regulating the ICS industry.

Conclusion

NCIC commends the Commission for the tremendous time and effort devoted to reforming ICS. ICS reform is a herculean task but the Commission has managed it with utmost professionalism and with due consideration to the views expressed by all the participating parties. We are pleased to have participated in this proceeding and extend our full support for the Commission and for the decisions as expressed in the Fact Sheet.

Respectfully submitted,

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